STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. SAN MARCOS UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4214-E PERB Decision No. 1508 January 16, 2003

Appearances: Madalyn J. Frazzini, Attorney for the California School Employees Association; Atkinson, Andelson, Loya, Ruud & Romo by Ronald C. Ruud, Attorney, for San Marcos Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association (CSEA) to a proposed decision of an administrative law judge (ALJ) which found that the San Marcos Unified School District (District) unlawfully threatened to cease deduction of employee organization dues from employee paychecks and dismissed the balance of the complaint. The complaint alleged that the District violated Educational Employment Relations Act (EERA) section 3543.5(a), (b), and (c)[1] by imposing or threatening to impose reprisals for

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code. Section 3543.5 states, in pertinent part:

protected activity, interfering with employees' protected rights, interfering with CSEA's protected rights, and committing an unlawful unilateral change in a matter within the scope of representation when it threatened to discipline employees, suspend union dues deductions, and suspend employees' rights under the collective bargaining agreement between the District and CSEA because employees had engaged in "picketing.[2]"

After reviewing the entire record in this case, including the proposed decision, CSEA's exceptions, and the District's response, the Board partially affirms and partially reverses the decision of the ALJ.

BACKGROUND

In December 1999 and January 2000, the parties were at impasse in negotiations over a successor collective bargaining agreement (CBA). During this period, employees represented by CSEA assembled outside City Hall[3] prior to two public meetings of the District's governing

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> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2] As discussed below, the parties disagree over the meaning and scope of this term.

[3] Stipulation of Facts, paragraphs 7, 8.

board. Some unit members passed out informational flyers and others carried signs which characterized the nature of the impasse and contained phrases such as "fair contract now." Approximately 65 bargaining unit members participated in this activity on December 13, 1999; approximately 90 members participated on January 10, 2000. Several bargaining unit members also made presentations to the governing board at both meetings.

Prior to its February 14, 2000, meeting, the District gave CSEA a letter stating, in pertinent part:

> You are hereby put on notice that any unit member who continues to picket or otherwise violate Article 17 [of the parties' CBA] will be subject to disciplinary action as provided in Section 17.3. In addition, as provided in Section 17.4, the District will withdraw all contractual rights, privileges and services provided to any unit member and the Association if violations continue. Among other things, this means the District will discontinue payroll deduction of Association dues. [Emphasis added.]

Section 17 of the parties' agreement stated:

> 17.1 It is agreed and understood that there will be no strike, work stoppage, slow-down, picketing or refusal or failure to fully and faithfully perform job functions and responsibilities, or other interference with the operations of the District by CSEA or its officers, agents, or members, during the term of this Agreement, including compliance with the request of other labor organizations to engage in such activity.
>
> 17.2 CSEA recognizes the duty and obligation of its representatives to comply with the provisions of the Agreement and to make every effort toward including all unit members to do so. In the event of a strike, work stoppage, slow-down, or other interference with the operations of the District by unit members who are represented by CSEA, CSEA agrees in good faith to take all necessary steps to cause those unit members to cease such action.
>
> 17.3 It is agreed and understood that any unit member violating this Article may be subject to discipline up to and including termination by the District.

> 17.4 It is understood that in the event this Article is violated the District shall be entitled to withdraw any rights, privileges or services provided for in this Agreement or in District policy from any unit member and/or CSEA. [Emphasis added.]

Approximately 60 CSEA members engaged in similar conduct, including carrying signs as described above, prior to the February 14 meeting.

On February 15, 2000, CSEA sent the District's superintendent a written demand for retraction of the District's February 14, 2000 letter on grounds that it violated employees' rights under EERA and other laws. In a letter to classified employees dated February 22, 2000, the District's superintendent said the February 14 letter was intended to notify employees of their contractual agreement to refrain from picketing and that employees' attendance at governing board meetings was "encouraged" and "welcome."

The District took no disciplinary action against any of its employees, nor did it discontinue payroll deductions of CSEA dues.

ALJ'S PROPOSED DECISION

The ALJ identified and ruled on four issues in the proposed decision:

> (1) When the District threatened to discontinue deducting dues for CSEA, did it violate subdivision (b) of section 3543.5?
>
> (2) When the District threatened to discipline employees for picketing, did it violate subdivision (a) of section 3543.5?
>
> (3) When the District threatened its employees with the discontinuation of their CSEA dues deductions, did it violate subdivision (a) of section 3543.5?
>
> (4) When the District sent its February 14, 2000, letter, did it violate subdivision (c) of section 3543.5?

Threatened Discipline for Picketing

Regarding the charge under EERA section 3543.5(a), the ALJ stated in the proposed decision that "the entire case rests…on whether CSEA and its members 'picketed' in the three cited instances." He further noted, "The definition of 'picketing' is crucial to a determination of whether the District was justified in its claim that CSEA was in violation of their CBA when it carried placards in the vicinity of, and immediately prior to, the District's governing board meeting." He then set forth excerpts from definitions of "picketing" in Black's Law Dictionary and Roberts Dictionary of Industrial Relations and turned to the parties' arguments.

CSEA argued that employees have a protected right under EERA and the First Amendment to engage in peaceful informational picketing. Divestment of such statutory and constitutional rights can only be effected by a "clear and unmistakable waiver," contended CSEA. Under that standard, CSEA argued that its agreement to section 17.1 did not constitute a waiver of employees' rights to engage in the conduct at issue in this case**.**

After tracing the historical development of the concept of picketing in the labor context, CSEA argued before the ALJ that currently, the commonly understood definition is "walking a picket line while on strike, withholding services, blocking ingress/egress, disruptive or violent behavior and discouraging business with the employer." CSEA also noted that the employees' actions at issue took place outside a meeting of the District's board of directors, not at a school site and not during school hours. Accordingly, argued CSEA, "the demonstration carried none of the indicia of traditional labor picketing." CSEA also cited Civil Code section 1645 for the proposition that "a contract's technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

The District characterized CSEA's argument as contending that "informational and other forms of peaceful picketing are not picketing at all." In response, the District acknowledged that the authorities cited by CSEA recognize different kinds of picketing. Nevertheless, argued the District, "peaceful or violent, lawful or unlawful, picketing is still picketing." The District conceded that "Black's Law Dictionary defines the terms picketing, informational picketing and unlawful picketing as words with different meanings." However, argued the District, "all are forms of picketing."

Finding no mention of "picketing" in EERA and no definition in PERB case law, the District said that private sector case law could "shed some light" on the meaning of the term. The District cited several National Labor Relations Board (NLRB) cases where various forms of conduct were found to constitute picketing, and quoted the NLRB as stating:

> The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advanced the cause of the union, such as keeping customers away from the employer's business. [Quoting Lumber & Sawmill Workers Local No. 2797 (1965) 156 NLRB 388 [61 LRRM 1046].]

Immediately following that quotation, the District stated, "In the public sector, as is the case here, the picketers seek to advance the union's cause, not by driving customers away but rather by putting pressure on elected bodies to meet the contract demands of the union." The District then said, "it cannot be disputed that employees massed in front of the employer's premises, carrying placards with labor dispute-related messages is garden variety picketing." [Emphasis in original.]

The District next argued, "By any definition, significant numbers of unit members did engage in picketing activity at the December and January Board meetings. They acted in

concert, carried placards on the end of a stick depicting the labor dispute, and stationed themselves outside the main entrance to the Board meeting."

The District also submitted argument regarding constitutional free speech principles, contending that the issues addressed by employees' signs in this case were not "matters of public concern" entitled to First Amendment protection.

During the hearing, the ALJ requested "legally supportable…facts" to help him make a decision as to the definition of "picketing." He also opined that the Board might provide a definition. In the proposed decision, the ALJ said CSEA submitted "comprehensive, well-thought-out and very analytical briefs that went into great detail concerning the differences between informational, peaceful, and disruptive picketing."

Regarding CSEA's argument that picketing in the labor context involves "walking a picket line while on strike, withholding services, blocking egress/ingress, disruptive or violent behavior and discouraging business with the employer,**"** the ALJ said, "this contention is not supported" by the excerpts from Blacks and Roberts.

The ALJ was unpersuaded by CSEA's observation that the activity in this case took place after school hours and off school premises and rejected CSEA's argument that the activity "carried none of the indicia of traditional labor picketing."

"The only credible authority" in support of CSEA's argument, said the ALJ, was Civil Code section 1645, requiring that a contract's technical words are to be interpreted as usually understood by persons in the profession or business to which they relate. That authority did not aid CSEA, however, found the ALJ. "The word 'picketing' is not so technical that it requires a special in-house definition. It has a general, common meaning among the public, even when used in a labor relations sense." Finding an "absence of any adjectives limiting the

breadth of the word 'picketing,'" the ALJ concluded that CSEA, through inclusion of the word "picketing" in Article 17, "agreed to refrain from picketing in all its various forms."

Regarding the text of Article 17, CSEA argued that the clause "or other interference with the operations of the district," as found in sections 17.1 and 17.2 of the CBA limited the definition of the listed prohibited activities, including picketing, such that the "picketing" prohibition was in effect only if it constituted an interference with the operations of the District. The ALJ rejected this notion, agreeing with the District that the phrase "or other interference" was a "catchall prohibition" that added to, but did not limit, the specific prohibited behaviors listed in the section.

CSEA further submitted that a waiver should not be found where, as here, the District did not provide a quid pro quo for such a waiver in the form of an agreement to submit contract disputes to binding arbitration. The ALJ agreed with the District that CSEA's argument was foreclosed by the Board's ruling in Modesto City Schools (1983) PERB Decision No. 291 (Modesto), p. 30 (district's insistence on waiver of right to strike unaccompanied by offer to submit to binding arbitration did not constitute failure to bargain in good faith, unless district's demand constitutes attempt to either avoid contract or weaken union.)

The District's arguments did not address whether non-disruptive informational picketing is protected activity under EERA. The District's brief to the ALJ referred to the "right to picket," but did not specify the authority for such a right. The ALJ's analysis noted CSEA's claim of an "EERA right to peaceably picket," but did not directly address whether EERA confers such a right.

The District noted CSEA's contention that the waiver "of the right to picket" must be clear and unmistakable. Although it did not express agreement with that waiver standard, the

District asserted that the waiver in Article 17 "is not only clear and unambiguous, it is also well settled that a union may waive such rights" (citing Long Beach Unified School District (1987) PERB Decision No. 608 (Long Beach). The District also argued that such a waiver would not violate employees' rights because "[p]icketing is but one of many pressure tactics a public employee union may use to demonstrate and publicize its bargaining objectives."

The ALJ did not expressly address CSEA's contention that the rights at issue could only be divested through a "clear and unmistakable waiver." The ALJ, as well as the District, cited Long Beach (No. 608) for the proposition that "PERB has long held that a union has the authority to agree to waive collective bargaining provisions that guarantee an employee's right to engage in specified union activities, so long as such agreement does not seriously impinge on rights provided by the EERA." The ALJ found that the ban on picketing does not "seriously impinge or limit a union's ability to communicate with the public over its employment issues" because other means of communication remained available.

Finding that CSEA contractually waived its members' rights to picket and that "picketing" included CSEA's members' conduct in this case, the ALJ concluded that, when the District threatened the employees with discipline for "picketing," it did not violate EERA section 3543.5(a).

Threatened Discontinuance of Dues Deduction – Employees

The District argued that a union may contractually waive employees' statutory rights, such as the right to dues deductions, as long as the employer does not insist to impasse on such a waiver. (Citing South Bay Union School District (1990) PERB Decision No. 791 (South Bay) (district violated EERA by insisting to impasse on provision barring union's protected right to file grievances on its own behalf); Chula Vista City School District (1990) PERB

Decision No. 834 (Chula Vista) (district violates EERA by insisting to impasse on non-mandatory subjects of bargaining).) The District contended that such a waiver resulted from CSEA's assent to Article 17.

The ALJ found that the District violated EERA section 3543.5(a) when it threatened the discontinuance of dues deductions (citing Fresno Unified School District (1982) PERB Decision No. 208 (Fresno)). In Fresno, the Board held that employees (by virtue of Ed. Code sec. 45060) and employee organizations (by virtue of EERA sec. 3543.1(d)) have absolute statutory rights to dues deductions that are not divested by a union's allegedly prohibited conduct. The Board also held that the statutory rights to dues deductions can only be forfeited by a clear and unmistakable waiver. A union's agreement to a penalty clause in a collective bargaining agreement that arguably terminated dues deductions in the event of certain conduct by the union was found insufficient to constitute a clear and unmistakable waiver of the employees' or union's statutory rights to dues deductions. The penalty provision was more reasonably interpreted as referring to rights secured through negotiations, not rights conferred by statute, found the Board. Therefore, the Board in Fresno ruled that the employer's cessation of dues deductions as punishment for a strike violated Section 3543.5(b).

The Board in Fresno did not rule on a Section 3543.5(a) allegation with regard to the dues deductions. Here, extrapolating from Fresno, the ALJ held that employees enjoy a statutory right to dues deductions and that, regardless of the union's actions, the right was not waived by the penalty clause in section 17.1.

The District argued that Fresno was distinguishable because the employer there actually ceased dues deductions, which had not occurred in this case, but did not persuade the ALJ. The ALJ did not specifically address the District's citations to South Bay and Chula Vista.

However, the ALJ's emphasis on the fact that absolute statutory rights were at issue in this case and in Fresno inherently distinguished South Bay and Chula Vista, which did not involve an alleged waiver of such absolute statutory rights. Ultimately, the ALJ found that, by threatening to stop dues deductions, the District violated EERA section 3543.5(a).

Threatened Discontinuance of Dues Deduction – CSEA

The ALJ found that the threat to discontinue dues deductions did not violate Section 3543.5(b). The ALJ reasoned that Section 3543.5(b) does not literally prohibit interference with organizational rights; it prohibits a denial of organizational rights. Section 3543.5(b) provides, "It shall be unlawful for a public school employer to do any of the following:…(b) Deny to employee organizations rights guaranteed to them by this chapter."

Therefore, because the threat of discontinuance of dues was never implemented, the ALJ apparently reasoned that it constituted, at most, "interference," but did not constitute "denial" of organizational rights prohibited by Section 3543.5(b).

Threatened Discontinuance of Dues Deduction for Employees as a Unilateral Change

CSEA argued that, by threatening to discontinue dues deductions of employees who engaged in the informational picketing, the District violated EERA section 3543.5(c) by unilaterally changing its policy contained in section 17. The District countered that there was no unilateral change because the District did not change a policy, it "merely gave notice of its intent to enforce the longstanding picketing prohibition in Article 17" (citing Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant)). The ALJ found the threat to deprive employees of their statutory right to dues deduction was not a unilateral modification of a matter within the scope of representation and, therefore, that there was no obligation to negotiate.

CSEA'S EXCEPTIONS

In its exceptions, CSEA contends, in sum, that the ALJ erred by: (1) failing to find a violation of EERA section 3543.5(a) when the employer threatened employees with discipline for engaging in protected activity; (2) deciding that resolution of the Section 3543.5(a) charge rested entirely on whether CSEA and its members had picketed the governing board meetings; (3) viewing the definition of "picketing" as crucial to determining whether CSEA violated the parties' agreement; (4) incorrectly applying Civil Code section 1645; (5) giving improper consideration to the clause "or other interference with the operations of the District" and failing to apply it to the term "picketing" in section 17.1; (6) failing to hold the District to the burden of proving a clear and unmistakable waiver by CSEA; (7) finding that "picketing" is not vague or ambiguous and that it has a common meaning among the public; (8) concluding that the contract language waived the right to picket; (9) misapplying Board precedent; (10) failing to find a unilateral change; and (11) imposing a waiver of constitutional rights absent a knowing, voluntary, and intelligible waiver, in violation of public policy.

Absent a waiver, CSEA contends that it is "indisputable that unit members' activity was an exercise of concerted conduct protected by EERA and the First Amendment." Accordingly, the District carried the burden of proving a waiver of those rights, argues CSEA, but it failed to satisfy that burden. CSEA further argues the waiver defense must meet a higher standard than ordinary waiver of statutory rights due to the potential chill of First Amendment freedoms that a waiver in this case would entail. CSEA further submits that, even if the CBA did restrict First Amendment rights, it would be unenforceable as contrary to public policy.

CSEA submits that the clause "or other interference" in section 17.1 limits and defines the nature of the prohibited activities listed before it, including picketing, such that those

activities are prohibited only if they cause disruption to District operations. In support, CSEA cites Civil Code section 1641, which states, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." CSEA contends the ALJ's interpretation would violate that principle of textual construction because interpreting the contract as waiving the right to all picketing would read the word "other" out of the contract.

To illustrate, CSEA asserts that if the word "other" were omitted from section 17.1, it would read, in pertinent part: "picketing,…or interference with operations of the District." This phrasing would have made "interference with operations of the District" an action separate and distinct from picketing. However, the contract contains the word "other," which, if it is to be given effect, means "interference with operations of the District" refers back to, and modifies, the list of prohibited actions, including the action of picketing.

CSEA also invokes the canon of textual construction known as "noscitur a sociis" (it is known by its associates),[4] for the principle that "picketing" should be interpreted in a manner consistent in definition and scope with the other items in the list of prohibited activities. Those other items clearly would interfere with operations of the District, so picketing should be interpreted in a similar manner, contends CSEA. That would exclude the conduct in this case, which did not interfere with the operations of the District.

CSEA further argues that the contract is susceptible to more than one meaning and that the word "picketing" is vague on its face, providing an insufficient basis for a waiver. In

[4] This is "a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." (Black's Law Dict. (7th ed. 1999) p. 1084.)

support of this position, CSEA cites two criminal law cases where an ordinance prohibiting "picketing" on a public highway or private property in connection with a strike was held to be too indefinite and uncertain to provide a basis for a criminal prosecution. Analogously, CSEA contends that "picketing" is too vague and ambiguous to support a finding of clear and unmistakable waiver of First Amendment rights by contract in this case.

In a conceptually related argument, CSEA submits that a contract provision containing the term "picketing" is unconstitutionally vague and, therefore, even if it purports to waive First Amendment rights, it cannot support disciplinary action against public employees.

Finally, CSEA argues that, even if the contract did effect a waiver, PERB should refuse to enforce it because to do so would harm the public interest. For authority and illustration, CSEA cites a judicial decision that refused to enforce a portion of a settlement agreement that waived an individual's constitutional right to run for public office. (Davies v. Grossmont Union High School District (9th Cir. 1991) 930 F.2d 1390 (Davies).) The court, in Davies, reasoned that "to treat political rights as economic commodities corrupts the political process" and was therefore violative of public policy. (Davies at p. 1398.) CSEA contends, analogously, that finding a waiver in this case would improperly indicate that the political rights of free speech and redress of grievances to a duly elected school board can be treated as commodities waiveable by contract in exchange for a wage and benefit package, which PERB should avoid. Nor has the District shown any legitimate reason for such a significant waiver, notes CSEA.

Moreover, notes CSEA, as a matter of federal constitutional right, public employees cannot be disciplined for speech on matters of public concern absent a showing that it constitutes a disruption to operations of the public agency. (See, e.g., Kirchmann v. Lake

Elsinore School Dist. (1997) 57 Cal.App.4th 595, 609 [67 Cal. Rptr. 2d 268], modified on other grounds and rehearing den. (2000) 83 Cal.App.4th 1098 [100 Cal.Rptr.2d 289]; review den. (2001) S092671; cert. den. (2001) 533 U.S. 902 [150 L.Ed.2d 231] (Kirchmann); Waters v. Churchill (1994) 511 U.S. 661, 675, 682; 128 L.Ed.2d 686] (Waters).) Accordingly, only an interpretation of the parties' agreement that prohibits disruptive picketing would survive constitutional muster, contends CSEA.

DISTRICT'S RESPONSE TO CSEA'S EXCEPTIONS

The District responds that CSEA's arguments, or variations thereof, were rejected by the ALJ who concluded that the contract prohibited picketing, that unit members had engaged in picketing activities within the commonly understood definition of the term, and that the District acted properly and within its authority when it gave notice that future violations would subject unit members to disciplinary action.

The District contests CSEA's argument that the words "other interference" limit the picketing prohibition to only that picketing which interferes with District operations. The term "other" in section 17 refers to "all unspecified conduct, not included within the scope of the six specifically prohibited activities, which interferes with District operations." Thus, argues the District, the ALJ correctly reasoned that "or other interference" is a "catchall" phrase that adds to the list of prohibited activities.

The District argues that none of the authorities regarding statutory and contractual construction cited by CSEA stand for the proposition that a general catchall phrase following a list of specific items should modify, restrict, or limit the listed items. Moreover, noted the District, such canons of construction come into play only if the meaning of language in the

contract is "questionable." As "picketing" has a plain, generally understood meaning, there is no basis for applying rules of statutory construction to interpret it.

The District also observes that the title of section 17 includes the term "concerted activities," which, according to dictionary definition, encompasses more than activity that interferes with District operations.

In opposition to CSEA's public interest argument, the District submits that in Davies, the sole case cited by CSEA, the contract language at issue forever waived the individual's right to seek or accept any office in the District, foreclosing all pathways to elected office. Thus, the District contends, nothing in that case suggests that a union may not, as was done here, temporarily waive but one of many available methods to publicly communicate its position on labor issues. Accordingly, argues the District, the waiver here, unlike in Davies, left other means available for employees' to exercise their rights, so it does not harm any public interest.

The District also argues that CSEA is not helped by cases finding that there is a First Amendment right to picket, as none of those cases state that the right cannot be waived.

Reliance on cases articulating public employees' rights to comment on matters of public concern are equally unavailing, contends the District. Those cases carefully distinguish between matters of general, broad public concern, relative to which an employee enjoys a constitutional right to free speech in the workplace, and matters of individual concern, such as an employee's private grievances, about which employees do not have a constitutional right to speak at work. Comments on collective bargaining fall into the unprotected category, so there is no constitutional impediment to the contractual provision at issue here, according to the District.

Consistent with that position, the District submits that the ALJ correctly applied Long Beach (No. 608) in concluding that CSEA had waived its right to engage in picketing. The District argues that, in Long Beach, PERB ruled that such waivers, negotiated in good faith, are valid and enforceable so long as the contract does not seriously impinge upon rights under EERA. The fact that a constitutional right is arguably at issue in the instant case should not change the outcome, argues the District, because the activities at issue in Long Beach "may be constitutionally protected" and the waiver analysis is equally applicable in the instant case.

Finally, the District contests CSEA's argument that the term "picketing" is unconstitutionally vague, noting that even if the criminal law standards cited by CSEA are applicable, the record "clearly shows unit members and other picketers understood perfectly the concept of picketing" contemplated by the prohibition in section 17.1. As evidence, the District notes that, after being provided with notice and a copy of section 17.1, many unit members "suddenly stopped" the conduct.

DISCUSSION

Pursuant to its statutorily defined jurisdiction, the Board's ultimate adjudicatory responsibility in this case, as with all cases brought before it on statements of exceptions, is to review the ALJ's decision in light of the record and the parties' arguments, independently assess whether the proposed decision accurately applies EERA to the facts of the case, and determine an appropriate disposition in light of the purposes of EERA and, if necessary, utilize the Board's remedial and administrative powers. Fulfillment of that responsibility is not a simple matter in this case, however.

As the parties' arguments demonstrate, adjudication of this case under EERA requires careful consideration of the language, fundamental purposes and doctrinal foundations of that statute; relevant public policy embodied in fundamental federal and state constitutional and labor law precedent; as well as exploration of the nature of the rights implicated herein and the legal standards governing their waiver.

Although the parties disagree on the meaning of the term, they both characterize the disputed activity in this case as "picketing" and they both direct the Board to private sector precedent for guidance. Adjudication of CSEA's charges and the District's actions relative to that disputed activity depends initially upon determination of its status under EERA. To properly address that issue, we begin as the parties suggest, by considering relevant fundamental public policy, reflected in analyses of the federal and state courts, the NLRB, and PERB.

Relevant Public Policy

It is a well-settled general principle that "peaceful picketing for a lawful purpose is an activity safeguarded by the First Amendment." (Miller v. UFCW Local 498 (9th Cir. 1983) 708 F.2d 467 [113 LRRM 3107] (Miller); see generally, Thornhill v. Alabama (1940) 310 U.S. 88 [84 L.Ed. 1093] (Thornhill); see also, McKay v. Retail Auto. S. L. Union No. 1067 (1940) 16 Cal.2d 311, 319-320 [7 LRRM 702], cert. denied (1991) 313 U.S. 566: "[T]he right to picket peaceably and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech." [citations omitted].) The right to picket is entitled to even greater protection when it occurs in a public place. (Pittsburgh Unified School Dist. v. California School Employees Assn. (1985) 166 Cal.App.3d 875, 891 [213 Cal.Rptr. 34].) Picketing can

nevertheless be regulated because it involves not only speech but also an element of conduct. (Miller at p. 471.) However, such regulation can only be imposed by a legislature for a compelling governmental purpose and must be justified in light of the affected free speech rights of employees. (In re Berry (1968) 68 Cal.2d 137, 154 [65 Cal.Rptr. 273].) Article I, section 2 of the California Constitution provides more stringent speech protections than does the First Amendment. (Robbins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 908 [153 Cal.Rptr. 854], aff'd (1980) 447 U.S. 74 [100 S.Ct. 2035; 64 L.Ed.2d 741].)

The employer at issue in this case is a public entity and, by operation of the First and Fourteenth Amendments, is subject to free speech restrictions. (Thornhill at p. 94: "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.")

When, as here, the government is serving as an employer, it has somewhat wider latitude to regulate speech of its employees than of the general citizenry. (Connick v. Myers (1983) 461 U.S. 138 [75 L.Ed.2d 708] (Connick).) Nevertheless, public employees retain First Amendment rights to comment on matters of public concern. (Waters; Connick; Perry v. Sinderman (1972) 408 U.S. 593; 33 L.Ed.2d 570] (Perry); Kirchmann.) For purposes of public employees' constitutional speech rights, "matters of public concern" include, inter alia, statements related to unionization, union-management relationships, and loss of confidence in the management of the public entity. (See Chico Police Officers' Assn. v. City of Chico (1991) 232 Cal.App.3d 635, 646 [283 Cal.Rptr. 610] (Chico); Gilbrook v. City of Westminster (9th Cir. 1999) 177 F.3d 839, 866.) As discussed below, the courts have developed stringent

standards governing waiver of such basic rights, whether by the employees or their exclusive representative.

In this case, the placards employees carried addressed the nature of the impasse and demanded a "fair contract now." CSEA contends that activity is protected by the First Amendment. The District argues that employees' First Amendment rights to comment on matters of public concern are not implicated in this case because "an employee's private grievances" were found not to be a matter of public concern in Connick. However, the argument lacks merit because, as the Supreme Court declared in the seminal Thornhill case:

> The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern…."Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [Thornhill at p. 103, citations omitted.]

Thus, the expressions of the CSEA members at issue in this case addressed a general labor dispute involving a public employer, not a single employee's "private grievance." California cases are in accord. (See, e.g., Chico at p. 647.) Accordingly, conduct of the type at issue here falls within the ambit of federal and California constitutional free speech protections,[5] evincing a strong, longstanding public policy in favor of protecting the right to engage in non-disruptive informational picketing. With that policy in mind, we turn to the first critical question in this case: whether non-disruptive informational picketing is a protected activity under EERA.

Status of Non-Disruptive Informational Picketing Under EERA

[5] The Board is mindful of its mandate in this case to rule on whether EERA was violated. While Constitutional sources do not provide the authority for the Board's order, examination of the Constitutional status of informational picketing and the principles

The Board has never ruled whether EERA confers a right to engage in peaceable informational picketing. The very few PERB cases that have discussed the issue have acknowledged the fundamental nature of the right to picket and have observed, but have not held, that such a right is protected under EERA. For example, in Modesto, the Board noted the similarity between rights guaranteed under the National Labor Relations Act (NLRA) and EERA and said, "Membership drives, meetings, bargaining, leafletting and informational picketing are activities which are, without question, authorized by section 3543." (Modesto at p. 62, emphasis added; see also, El Dorado Union High School District (1985) PERB Decision No. 537 (El Dorado) (right to picket is "arguably protected activity").)

Given that the status of "picketing" under EERA is directly at issue under the facts of the instant case, the Board finds that the observations in Modesto and El Dorado regarding the EERA-protected status of informational picketing merit evaluation in light of subsequent case law and the fundamental purposes of EERA. However, as discussed below, Modesto and El Dorado do not constitute binding precedent regarding whether informational picketing is protected activity under EERA.

Modesto was a case about strikes, not picketing. Similarly, the issue in El Dorado was whether teachers had engaged in a partial strike and, if so, whether their conduct was unlawful. The Board, in El Dorado, stated that picketing was "arguably protected" activity under EERA, but expressly stated "the Board does not consider the question before it to be whether the picketing, in itself, violated the Act." Thus, neither Modesto nor El Dorado ruled that informational picketing is a protected right under EERA.

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applicable to public employee speech reveals and illuminates important historical, public policy and analytic background. For further related discussion, see footnote 8, infra.

Rather, the observations in Modesto and El Dorado regarding informational picketing were dicta, not binding decisions of the Board based on the records in those cases. "Dicta" is "general argument or observation unnecessary to the decision which has no force as precedent." (United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 823, 834 [209 Cal.Rptr. 16], citations omitted.) PERB, like the courts, is not bound by dicta. (See, e.g., Baldwin Park Unified School District (1991) PERB Decision No. 903.) Stated differently, PERB does not issue "advisory opinions," meaning generalized declarations of law on issues that are not raised by the facts of a case or necessary for its resolution. (See, e.g., Long Beach Community College District (2002) PERB Decision No. 1475 and cases cited therein.)

To treat Modesto or El Dorado, without further analysis, as authority for finding that EERA confers a right to engage in non-disruptive informational picketing would elevate dicta to binding precedent or construe picketing-related language in those cases as binding advisory opinions, contrary to longstanding Board precedent and fundamental principles of appellate jurisprudence. Based on the foregoing, we respectfully disagree with the concurrence, infra, that citation to dicta in Modesto and El Dorado is sufficient to establish that informational picketing is protected activity under EERA.

Accordingly, we now examine Modesto in light of relevant subsequent case law and the purposes of EERA, in the interest of determining the status of non-disruptive informational picketing under EERA in the context of this case. The Board in Modesto observed that, unlike the NLRA,

> EERA contains no reference to concerted activities. It does, however, in section 3543, guarantee public school employees the right, free from employer interference, 'to form, join, and

> participate in the activities of employee organizations of their own choosing….'
>
> The only difference we find between the right to engage in concerted action for mutual aid and protection [protected by section 7 of the NLRA] and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. [Modesto at pp. 61-62, ellipses in original, fn. omitted.]

Citing private sector cases on the subject of strikes, the Board in Modesto found that, just as the basic purposes of the NLRA mandated a determination that the right to strike was protected under that act, the substantively similar purposes of EERA mandated a finding that the right to strike is protected under EERA. The Board in Modesto also reasoned that the purposes of EERA mandated that informational picketing should be found a protected right under EERA. However, as the issue of picketing was not presented on the facts of Modesto, the Board did not expressly hold that EERA confers a right to engage in non-disruptive informational picketing.

The analysis in Modesto was revisited in the Board's split decision in Compton Unified School District (1987) PERB Order No. IR-50 (Compton). There, ruling on a request for injunctive relief to block a teacher strike, a plurality of the Board overruled Modesto insofar as it held that employee strikes are a protected activity under EERA. Although strikes are not at issue in the instant case, the analysis in Compton must be examined to assess whether and how it affects the viability of Modesto's observations regarding picketing.[6]

[6] Compton purported to overrule Modesto. Although strikes, not picketing, were at issue in both cases and informational picketing is at issue herein, it remains necessary to examine Compton to determine whether its analysis of the rationale in Modesto regarding

The Compton case produced three separate written discussions: a lengthy lead analysis by the plurality author, a concurrence by a second Board member agreeing to portions of the plurality author's analysis and conclusions, and a dissent by the third Board member.

Reviewing public sector labor relations statutes, most of them in transit districts, the plurality discussion in Compton noted that, in some statutes but not in others, the Legislature included the following language found in the definition of protected activity in section 7 of the NLRA, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Examining patterns of the co-occurrence of that language and a finding in the private sector and under various California statutes of the right to strike, the plurality assumed that the "other concerted activities" language was legislative code for the right to strike. Citing the absence of that language in EERA, concerned with avoiding interruption to public education, and finding that other judicial case law had not resolved the status of strikes under EERA, the plurality held that teacher strikes are not protected activity under EERA. Regarding Modesto, the plurality stated,

> This Board's decision in [Modesto] is clearly incorrect and is overruled insofar as it interprets EERA section 3543 as authorizing work stoppages by public school employees for the purpose of collective bargaining or other mutual aid or protection. [Compton at p. 106.]

The plurality discussion then determined that the strike in Compton constituted an unfair labor practice for four reasons: (1) the union used disruption and interference in school operations as a coercive tactic to "obtain employer capitulation" in bargaining; (2) the union's use of the strike unilaterally changed the terms and conditions of striking teachers'

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protected rights under EERA, although directed to strikes, obviated the question of whether Modesto correctly observed that informational picketing is an EERA-protected right.

employment, which constituted a failure to bargain in good faith; (3) the union attempted to achieve bargaining goals in a manner the Board found violative of public policy, which was a failure to bargain in good faith; and (4) the strike violated "one of the underlying policies of EERA, which is to maintain the continuity and quality of educational services," and, because violation of that policy was designed to achieve bargaining demands, again constituted a failure to bargain in good faith. In a footnote to the section where those four reasons were summarized, the plurality discussion stated that Modesto was overruled "insofar as [it is] inconsistent with the conclusions herein." (Compton at p. 160.)

The plurality's lengthy analysis in Compton carried only the vote of its author. A second Board member wrote a concurring opinion, agreeing with the plurality that the strike in Compton constituted a failure to bargain in good faith. The basis for that agreement by the concurrence was that:

> [T]he strike was employed to cause a total breakdown of two discreet [sic] activities that are guaranteed by statute and case law: (1) basic education for students and (2) negotiations free from coercive tactics that hold hostage that education. (Compton at page 167.)

The concurrence also said the strike "arguably violated" the mandate in Section 3540 to improve employer-employee relations, but did not expressly base its concurrence on that comment. Regarding Modesto, the concurrence stated in a footnote:

> As set forth [in the plurality discussion], I concur that the Board's earlier interpretation of section 3543 is incorrect and I join [the plurality author] in overruling [Modesto] on that point. But just as EERA confers no statutory right to strike, neither does it expressly by law prohibit strikes. The sole issue before the Board in any strike case is whether the facts of that strike can lead to a finding that the strike is an unlawful activity under EERA.

It is unclear from that statement how much of the plurality's analysis the concurrence joined, beyond its rejection of the finding in Modesto that EERA confers a statutory right to strike. Neither the plurality nor the concurrence addressed the observation in Modesto that non-disruptive informational picketing is protected activity under EERA.

The plurality decision was reached over a strongly worded dissent which viewed the plurality's analysis as the "16 magic words" approach (referring to the 'other concerted activities" language) and as evincing "a quest to find a basis for enjoining strikes they find personally distasteful." The dissent noted that the statutes examined by the plurality differed from EERA not only in terms of the "other concerted activities" language emphasized by the plurality, but in other substantive respects as well.

None of the three opinions in Compton expressly rejected or disapproved the statement in Modesto that EERA protects informational picketing. In terms of substantive analysis, none of the Board members' analyses, including the plurality's expressed reasons for overruling Modesto, disturbed the observation in Modesto that informational picketing is protected activity under EERA. The public policy concerns repeatedly emphasized by the plurality's lead discussion in Compton, the primary of which was avoiding disruption of public education potentially occasioned by a strike, are not implicated by non-disruptive informational picketing. A plurality of two Board members in Compton agreed that the strike was unlawful, but only on the grounds that the strike disrupted the educational process and the union used that disruption for purposes of coercion in negotiations, which they agreed constituted a failure to bargain in good faith. Those concerns are not implicated by non-disruptive informational picketing, which, by definition, does not disrupt the operations of the district.

Thus, neither the ruling in Compton nor the plurality's criticism of the analysis in Modesto disturbed the Board's earlier observation in Modesto that EERA confers the right to engage in non-disruptive informational picketing. Mindful of the Compton plurality's general observation that the Board must remain attentive to the text of EERA when ruling on cases arising under it, the Board now turns to the language and purposes of that statute to assess whether the statement in Modesto, that informational picketing is a protected activity under EERA, accurately reflects the purposes of that act.

EERA expressly provides employees with the right "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (EERA sec. 3543(a), emphasis added.) Non-disruptive informational picketing is a means of communication that has long been protected in judicial and administrative enforcement of the First Amendment and foundational labor law principles, as discussed in detail supra. It is a classic form of participation by employees in the activities of employee organizations for the purpose of representation on matters of employer-employee relations. The informational picketing at issue in the instant case is a perfect illustration of this point: the employees were carrying signs before a public policy making body, expressing their beliefs as bargaining unit members regarding the impasse and state of contract negotiations.

Thus, non-disruptive informational picketing is a collective activity both constitutionally protected and long recognized in foundational labor law to be intimately related to the ability of employees to engage in union activities, a right literally conferred by the text of EERA. Accordingly, as the issue is squarely presented on the facts of this case, the Board now holds what it correctly observed in Modesto, that non-disruptive informational

picketing is protected activity under EERA. The Board need not and does not speculate regarding the status or definition of other forms of picketing under EERA.

Clear and Unmistakable Waiver Standard

Statutorily and constitutionally protected rights – such as the right to engage in non-disruptive informational picketing,[7] can only be divested, by employees or their exclusive representative, through a "clear and unmistakable waiver." (Wright v. Universal Maritime Service Corp. (1999) 525 U.S. 70, 80 [159 LRRM 2769]; California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 938 [59 Cal.Rptr.2d 488]; Metropolitan Edison Co. v. NLRB (1983) 460 U.S. 693, 708 [112 LRRM 3265] (Metropolitan Edison) (waiver of employee rights by union must be clear and unmistakable); Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105].)[8]

The need to prove a clear and unmistakable waiver in this case is underscored by the breadth and severity of the penalty set forth in the contract for engaging in "picketing." Invoking section 17.4 of the CBA and using language arguably even broader than that contractual provision, the District, through its letter, threatened to discipline employees, cease dues deductions, and "withdraw all contractual rights, privileges and services provided to any

[7] The Board does not speculate herein regarding what sort of waiver would suffice to divest employees of any claimed right to engage in other forms of picketing.

[8] The Board finds that the stringency of this waiver requirement accommodates the public policy concerns CSEA contends are implicated by the disputed waiver in this case. Accordingly, the Board need not address the parties' contentions regarding Davies, supra. The courts have found that even fundamental rights can be waived, but have protected those rights (and the public interest) by requiring that a waiver, to be effective, must be clear and unmistakable.

unit member and the Association…" (emphasis added.) Thus, the penalty for informational picketing, under the District's interpretation of the contract, would include forfeiture of all benefits of the negotiated CBA. The legality of such a penalty provision, one that arguably infringes on employee and employee organization rights protected under EERA, although questionable, is not before the Board. However, the remarkable breadth and severity of section 17.4 and the arguably more severe threat in the District's letter make even clearer that the rights to engage in non-disruptive informational picketing protected by EERA (and the First Amendment)[9] can only be found forfeited in this case on proof of a clear and unmistakable waiver.

The ALJ did not address the relevance or application of the clear and unmistakable waiver standard. Instead, the proposed decision cited Long Beach (No. 608), for the principle that a union may waive "collective bargaining provisions that guarantee an employee's right to engage in specified union activities" provided the agreement does not "seriously impinge on rights provided by the EERA." The ALJ's approach was erroneous for two reasons.

First, the interest potentially waived here is not just a right contractually secured through bargaining, but a fundamental right that derives from EERA and the federal and state constitutions. Thus, the ALJ's explication of a standard governing a union's waiver of contractual rights is inapposite. Moreover, the principle articulated by the ALJ, that a union can waive employee rights, does not obviate the basic rule that it can only effect such a waiver

[9] While this Board does not rule on disputes regarding waiver of First Amendment rights, those cases are noteworthy because they reveal public policy that is consistent with the principles guiding the Board's analysis herein. Whether applied by a court charged with enforcing federal Constitutional rights or by the Board when enforcing rights protected by EERA, the waiver standard applicable to section 17.1 of the parties' agreement is the same: to

through clear and unmistakable means. In Metropolitan Edison, the U.S. Supreme Court articulated a standard similar to the one described by the ALJ herein and held that a union may waive employees' statutory rights as long as it does not violate the duty of fair representation or impair employees' ability to choose their representative. (Metropolitan Edison at p. 708.) However, the Court went on to explain, "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." (Ibid., emphasis added.) Thus, even if the waiver did not violate the union's duty of fair representation or impinge on employees' ability to choose their representative, it still would have to be clear and unmistakable to be effective.

Second, as discussed above, the provision at issue here arguably does "seriously impinge on rights provided by the EERA," not only because it potentially affects employee rights to engage in non-disruptive informational picketing and participate in union activities, but because the threatened penalty for engaging in the protected activity is forfeiture of "all contractual rights." The right to choose a representative is of little significance if that representative bargains away employees' right to have representation and exercise concerted activity.

Thus, even if the clear and unmistakable waiver requirement were ignored, application of the waiver language relied on by the ALJ from Long Beach, or the similar language from Metropolitan Edison, would not clearly mandate a finding that the waiver was enforceable, as the proposed decision suggests. Application of that standard is not dispositive, however,

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divest employees of their important rights to engage in non-disruptive informational picketing in either forum, the waiver must be clear and unmistakable.

because federal and California case law make clear that a waiver of employees' statutory or constitutional rights, whether by the employees or their representative, to be effective, must be clear and unmistakable. That is the standard the Board applies herein.

Application of Clear and Unmistakable Waiver Standard to This Case

The District argues, and the ALJ found, that CSEA waived by contract its employees' rights to picketing in all its forms, including the conduct at issue in this case. It must be determined, therefore, whether section 17.1 effected such a waiver of the right to engage in the conduct at issue here.

Section 17.1 states, in pertinent part,

> It is agreed and understood that there will be no strike, work stoppage, slow-down, picketing or refusal or failure to fully and faithfully perform job functions and responsibilities, or other interference with the operations of the District by CSEA or its officers, agents, or members, during the term of this Agreement, including compliance with the request of other labor organizations to engage in such activity. [Emphasis added.]

For the reasons discussed below, the Board finds that this language does not constitute a clear and unmistakable waiver by CSEA of the EERA-protected rights of these employees to engage in non-disruptive informational picketing.[10]

Meaning and Scope Of the Term "Picketing"

As the decision of the ALJ and the parties' arguments reflect, assessment of whether section 17.1 constituted a waiver of employees' right to engage in the conduct at issue in this case depends in large part on the meaning of the word "picketing" and whether agreement to that term in the waiver clause clearly and unmistakably waived employees' rights to engage in the conduct at issue herein.

During the hearing, the ALJ stated,

> I want legally supportable…facts that will help me make my decision as to what is picketing, number one, and two, whether or not you picketed. And three, whether or not the contract prohibits whatever that kind of picketing you did, if in fact you did picketing.

As noted above, the District submitted dictionary definitions of picketing from Black's Law Dictionary and Roberts Dictionary of Industrial Relations and argued that they

[10] The Board does not examine or comment on the effects of the waiver clause at issue herein with regard to other forms of picketing that are not presented on the facts of this case.

encompassed the conduct at issue in this case. Summarizing his understanding of the definitions from Black's and Roberts, the ALJ stated,

> Neither of the definitions set forth alternative circumstances that are present in most picketing situations.…Neither of them insists that in order to have picketing, there must be (1) withholding of services, (2) blocking egress/ingress, (3) disruptive or violent behavior, and (4) discouraging business with the employer. The definitions describe picketing as a circumstance in which employees demonstrate with signs or placards in front of an employer's establishment with an intent to notify the public a labor dispute is in progress, with the ultimate intent of bringing pressure on the employer to grant them whatever benefit they are seeking. [Emphasis added.]

Rejecting CSEA's argument that non-disruptive informational picketing falls outside the ambit of traditional labor picketing, the ALJ said, "this contention is not supported" by the excerpts from Blacks and Roberts. However, the ALJ did not ultimately rely on the dictionary definitions, but instead said, "The word 'picketing' is not so technical that it requires a special in-house definition. It has a general, common meaning among the public, even when used in a labor relations sense." Finding an "absence of any adjectives limiting the breadth of the word 'picketing,'" the ALJ concluded that CSEA "agreed to refrain from picketing in all its various forms" when it agreed to the language in Article 17.1. The ALJ did not set forth the content or source of the "general, common meaning among the public" on which he relied.

PERB is statutorily charged with initial, exclusive jurisdiction to interpret and enforce the statutes it administers because of the Board's expertise in labor law and policy. (San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12 [154 Cal.Rptr. 893]; South Bay Union School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 502, 506 [297 Cal.Rptr. 135].) The Board does not fulfill that mandate by relying on dictionary definitions or an undefined "general, common meaning among the public" when, as discussed in detail

below, dispositive language and concepts have been discussed and defined through decades of labor law and history. The Board's duty here is to examine the circumstances of this case in light of that precedent to determine whether inclusion of the word "picketing" in section 17.1 clearly and unmistakably waived employees' rights to engage in the public governing board meeting conduct.

Even assuming, for purposes of analysis, that reference to dictionary definitions such as Roberts would be appropriate in this case, the ALJ's explained understanding of those definitions does not accurately reflect the dictionary passages to which it refers. The text from Roberts quoted by the District and ALJ recognizes the important distinction between non-disruptive informational picketing and picketing designed to disrupt employer operations.[11] That distinction is critical to assessing whether inclusion of the word "picketing" in section 17.1 constitutes a clear and unmistakable waiver in this case.

Moreover, the ALJ's understanding of the dictionary definition of picketing is inconsistent with federal and state labor law and policy because, as discussed below, (1) the presence of "signs or placards" is not dispositive of whether conduct constitutes picketing, and (2) picketing designed to publicize the fact of a labor dispute is treated in law and public policy

[11] Roberts also separately defines "informational picketing" as follows:

> A form of publicity picketing. It is a protected activity under Section 8(b)(7)(C) of the National Labor Relations Act for a union to conduct informational picketing "for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization." Informational picketing, thus, is legal if a union's actions constitute an appeal or communication to the public, and the information conveyed is accurate and truthful. Such picketing is illegal when it disrupts, interferes, or curtails an employer's business.

differently from picketing designed to disrupt an employer's operations. Factually, the ALJ's understanding of the dictionary definition is of limited relevance to this case because, here, the employees were in front of City Hall, not the employer's establishment. There also was no evidence the employees' conduct was intended to coerce concessions from the employer. In addition, to define "picketing" as conduct intended to "bring pressure" on the employer would set a vague standard, would conflict with fundamental public policy protecting public employee expression, and would be at odds with the record evidence indicating that the District's governing board "has always encouraged employees" to attend public meetings.

Even if Roberts dictionary is consulted for guidance, examination of the circumstances of this case in light of public policy expressed in labor precedent would be required before the effect of including "picketing" in the waiver clause could be assessed. In language quoted by the ALJ, the discussion in Roberts goes on to state:

> The definitions [of picketing] have been developed from case law, and what constitutes recognitional or organizational picketing … depends almost entirely on the particular circumstances of the case.

Thus, regardless of whether the Board, as expert agency, examines this case in terms of fundamental labor law precedent or looks to Roberts dictionary for guidance, the same inquiry is necessitated: to determine the status of the conduct at issue here and the effect of inclusion of "picketing" in the waiver clause, the circumstances of this case must be examined in light of case law exploring the concepts, definitions, and public policy regarding conduct alleged to be "picketing." The ALJ quoted the language from Roberts dictionary mandating such an inquiry, but the proposed decision failed to conduct it.

The Board finds that neither dictionary definition, nor the ALJ's written understanding of those definitions, are dispositive. As the ALJ disclosed neither the source nor the content of the "general, common meaning among the public" on which he ultimately relied, the Board turns now to consider the circumstances of this case in light of relevant fundamental precedent.

Case Law Definitions of Picketing

A large body of precedent from federal courts and the NLRB has grappled with "definitional problems" arising when the word "picketing" is applied to various combinations of conduct and expression. (See, e.g., NLRB v. United Furniture Workers of America (2d. Cir. 1964) 337 F.2d 936, 939 [57 LRRM 2347].)[12] Those cases reveal two fundamental reasons why the word "picketing" has no clear meaning or scope unless it is interpreted in light of modifying language or contextual information from which its intended meaning can be deduced.

First, clear, fundamental distinctions in law and policy have been drawn between forms of picketing and corresponding levels of protection based upon the intended or reasonably perceived purpose of the activity or its effects on the employer.[13] Picketing for the purpose of

[12] The California Supreme Court has noted that private sector precedent provides "reliable if analogous" authority when interests adjudicated in the private sector are, as here, similar to those at issue in cases involving California's collective bargaining statutes. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616-617 [116 Cal.Rptr. 507].)

[13] For example, federal courts and the NLRB have long distinguished between recognitional, organizational, area-standards, and purely informational picketing, and have given them different levels of protection. (See, e.g., NLRB v. Calkins (9th Cir. 1999) 187 F.3d 1080 [161 LRRM 3121]; NLRB v. Drivers, Chauffeurs, and Helpers Union Local 639 (1960) 362 U.S. 274 [45 LRRM 2975]; Carpenters Local 2361 (1980) 248 NLRB 313 [103 LRRM 1444], aff'd without opinion (9th Cir. 1981) 652 F.2d 61.) Picketing designed to inform the public that an employer does not employ union members or does not have a contract with a union is protected activity, unless it is designed to force recognition of the union by the employer (absent union certification or a pending representation petition) and disrupts the

truthfully advising the public regarding the existence or nature of a labor dispute is treated very differently from picketing with the purpose or effect of disrupting an employer's operations.[14]

On the other hand, the definition of "picketing" cannot be reduced to a clear or consistent description of physical conduct. Even the presence or absence of stereotypical behavior associated with picketing, such as patrolling with placards – is not, alone, dispositive regarding whether an activity constitutes "picketing" and, if so, of what variety. The same physical conduct can lead to conflicting decisions, depending on other factors, such as the participating employees' purpose, which must be determined by examining the circumstances of the entire case.[15]

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employer's operations. (See, e.g., NLRB v. Musicians Union (9th Cir. 1992) 960 F.2d 842, 845 [140 LRRM 2017], Labor Management Relations Act [LMRA] Section 8(b)(7)(A), (B), and (C).) Picketing designed to inform the public that an employer does not pay wages in accordance with area standards is protected regardless of effect on employer operations. (Houston Building & Construction Trades Council (1962) 136 NLRB 321 [49 LRRM 1757].) Picketing to publicize unfair labor practices by the employer, to demand reinstatement of unlawfully discharged employees, or for the purpose of work preservation all are protected.

[14] For example, when assessing informational picketing, the NLRB has distinguished between "signal picketing" – designed to encourage unions or union members to avoid work that benefits the picketed employer – which is impermissible regardless of effect if it is conducted for a representational purpose, and "publicity picketing" – designed to effectuate a consumer boycott – which is permissible unless it disrupts the employer's operations. (See, e.g., NLRB v. International Brotherhood of Electrical Workers Local 3 (2d Cir. 1964) 339 F.2d 600; Carpenters Local 2133 (1965) 151 NLRB 1378, enforced (9th Cir. 1966) 356 F.2d 464 [58 LRRM 1617].) See also, discussion regarding protected status of non-disruptive informational picketing, supra.

[15] The absence of placards has been treated by some courts as militating against a finding of picketing (see, e.g., Danielson v. Local No. 99 (S.D.N.Y. 1974) (not published in official reports) 87 LRRM 3005). However, the presence of a large number of employees near an employer's business carrying no placards and posting no signs has been deemed picketing by other courts. (See, e.g., Mine Workers Dist. 30 (1967) 163 NLRB 562, enforced by unpublished decision (6th Cir. 1968) [69 LRRM 2792].)

Absent qualifying language or information, a ban on "picketing" could refer to such divergent factual scenarios as (a) a group of people walking around in the vicinity of an employer with placards;[16] (b) a group of people standing still without any placards near an employer's premises who appear (at least in the determination of a court in later litigation) to be assembled to encourage action against the employer[17]; (c) placement of signs in a snowbank near an employer's premises while employees sit in cars nearby[18]; and (d) placement of a sign on an employer's trailer while employees distribute handbills nearby.[19] Determining whether some of those factual scenarios constitute "picketing" has depended on various factors other than physical conduct, such as the employees' subjective purpose and the effects of their conduct or expression.[20]

Highlighting the fundamental legal significance of whether picketing is conducted with the purpose, or has the effect, of disrupting an employer's operations, the Ninth Circuit has overturned court orders that prohibit all picketing for a specified period to remedy unlawful recognitional picketing. In Miller, the Ninth Circuit held that picketing could be enjoined only

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[16] See, e.g., Danielson v. Ladies Garment Workers Local 99 (S.D.N.Y. 1974) (not published in official reports) [87 LRRM 3005].

[17] See, e.g., Mine Workers Dist. 30 (Terry Elkhorn Mining Co.) (1967) 163 NLRB 562, enforced by unpublished decision (6th Cir. 1968) [69 LRRM 2792].)

[18] See, e.g., Teamsters Local 182 (1962)135 NLRB 851, enforced (2d. Cir. 1963) 314 F.2d 53.

[19] See Lawrence Typographical Union No. 570 (1968) 169 NLRB 279, enforced (10th Cir. 1968) 402 F.2d 452 [69 LRRM 2591].

[20] For example the dispositive factor for the court in Terry Elkhorn Mining Co., supra, was whether the employees appeared to be gathered for the purpose of encouraging action against the employer. (Ibid.)

to the extent that it perpetuated the effects of the unlawful picketing. To enjoin all picketing would run afoul of employees' statutory and Constitutional rights. (Miller at p. 470, 472.)

The Ninth Circuit ruled similarly in Johansen v. Carpenters San Diego County District Council (9th Cir. 1984) 745 F.2d 1289 [117 LRRM 3028] (Johansen). There, the court held that a blanket "hiatus" injunction banning all picketing to remedy an unlawful secondary boycott impermissibly infringed on employees' First Amendment speech rights. (Johansen at p. 1295.) To avoid First Amendment problems, the court required that any remedial ban be narrowly tailored to prevent only unlawful picketing, not broadly proscribing all picketing.

Thus, a voluminous body of case law distinguishes the types of picketing and corresponding levels of protection, focusing on whether the purpose of the picketing is to provide information to the public, disrupt the employer's operations, or compel recognition of a union, and on the effects of the activity. At the same time, the word "picketing" applies to a wide, and sometimes inconsistent, range of physical activity, including several kinds of activity that do not involve the stereotypic image of employees carrying placards.

It must be remembered that the word "picketing" in this case exists in the context of a collectively bargained labor agreement. "Picketing" in the labor context has been examined and applied in the labor context by courts and the NLRB in myriad factual scenarios, as discussed above. CSEA is correct that informational picketing is treated fundamentally differently in the labor context than picketing with the purpose or effect of disrupting employer operations.[21]

[21] This distinction pervades labor policy in California. See, e.g., Code of Civil Procedure section 527.3(a), which declares legal and prohibits a court from issuing an injunction to prohibit the following activity:

The ALJ erred by relying on a "a general, common meaning among the public" as a dispositive definition of "picketing" in this case for several reasons. First, the source and content of the ALJ's understanding of this "general, common meaning" is not identified. He offered a definition purportedly, but not actually, summarizing the definitions from the Roberts and Blacks dictionaries, but it is not clear that he was referring even to his own definition when he spoke of the "common meaning."

Second, "picketing" in "general," refers to a very wide range of conduct including constitutionally protected, non-labor related activity, such as patrolling with placards expressing personal or political opinions. (See, e.g., Paradise Hills Associates v. Procel (1991) 235 Cal.App.3d 1528, 1544 [1 Cal. Rptr. 2d 514] (homeowner carrying sign complaining of inferior building conditions was engaged in constitutionally protected picketing: "It is established that peaceful picketing or handbilling carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by

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> (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.
>
> (2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.
>
> (3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests.

That provision does not apply to public employees. (Code Civ. Proc. sec. 527.3(d).) Nevertheless, it demonstrates the strong public policy in California of distinguishing between non-disruptive informational picketing, which is protected, and disruptive picketing, which can be limited, consistent with the authorities cited, supra.

the First Amendment." (Citations omitted.)) The District's own witness during the ALJ hearing testified that he derived his understanding of the definition of picketing as "getting in line and gathering as a group, holding a sign, card…" based on experience gleaned during his "younger days of the Civil Rights movement…."

In light of the extremely broad application of the word "picketing" and the differences in legal status of various activities falling within the ambit of that generalized term, the Board finds that inclusion of the word "picketing," alone, in the collectively bargained provision at issue here, is insufficient, absent modifying language or other information giving it a discernable meaning, to constitute a clear and unmistakable waiver of the EERA-protected right to engage in non-disruptive informational picketing.

Same Outcome Under Both Parties' Interpretations of Section 17.1

Both parties presume that the agreement effected a successful waiver of at least some picketing rights.[22] Their dispute is over whether the waiver covers the conduct at issue here. The prohibition of "picketing" in section 17.1 is contained within a list of disruptive activities, followed by the phrase "or other interference with the operations of the District." The parties submitted careful and diametrically opposed textual-construction arguments regarding the scope of the waiver they claim was effected by that language. The crux of their interpretive disagreement is over whether the phrase "or other interference with the operations of the District" modifies the list of prohibited activities as CSEA contends, or constitutes an independent catchall phrase, as the District argues.

[22] The Board does not affirm or dispute the validity of this presumption beyond assessing the effect of section 17.1 on employees' rights to engage in non-disruptive informational picketing under the facts of this case.

However, in light of the foregoing discussion regarding the divergent definitions of the word "picketing," the difference between the parties' suggested constructions is immaterial; under either reading of the provision, the contractual language would fail to waive the employees' protected right to engage in the conduct at issue in this case. If the District's argument were accepted, inclusion of the word "picketing" in section 17.1 of the parties' agreement would be, for the reasons discussed above, insufficient on its own to effect a clear and unmistakable waiver of employees' EERA (and First Amendment) rights to engage in non-disruptive informational picketing. Under CSEA's argument, the waiver would be narrowly constrained to picketing that interferes with District operations and would not cover the protected conduct at issue in this case.

Dispute Regarding Construction of Article 17

Separate from and in addition to the above ruling, the Board notes that ascertaining the meaning of section 17.1, if possible, would be helpful to resolution of the parties' dispute. Questions regarding the precise meaning of the word "picketing" aside, if CSEA's interpretation were correct that the waiver is limited by the phrase "or other interference with the operations of the District," there clearly would be no waiver by contract of the right to engage in the conduct at issue in this case. As the parties submitted no evidence of bargaining history, the Board finds that the most reasonable way to discern the meaning of section 17.1 is to examine the contractual language in light of the legal and historical context within which the agreement was negotiated.[23]

[23] PERB precedent requires the Board to interpret collective bargaining agreements according to their plain meaning if the language is clear. (Trustees of the California State University (1996) PERB Decision No. 1174-H; Marysville Joint Unified School District (1983) PERB Decision No. 314.) If the language is ambiguous, then the Board may consider

Legally, this agreement arose within a context where the distinction between informational and disruptive picketing had long been recognized in a multitude of decisions by the NLRB, the federal courts, and early PERB analyses, such as in Modesto. Historically, as reflected in the plenitude of litigation resulting in the judicial and administrative decisions that articulated the distinctions between various forms of picketing summarized, supra, a great many labor negotiations and disputes involving various forms of conduct deemed to be picketing have permeated the experiences of labor relations practitioners across the country for decades.

Thus, section 17.1 must be examined in a collective bargaining context wherein (1) the waiver could potentially affect constitutionally and statutorily protected informational picketing rights, (2) California and federal case law contain a strict requirement that, to be effective, a waiver of such rights must be "clear and unmistakable," (3) there is a fundamental distinction in law and labor history between non-disruptive informational picketing and picketing with the purpose or effect of disrupting employer operations, and (4) that basic distinction has been firmly and consistently established across divergent factual scenarios both in legal precedent and national historical labor-relations experience for decades as the courts have defined "picketing" in light of fundamental labor policy and First Amendment protections.

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extrinsic evidence, such as bargaining history, to ascertain the meaning of contractual terms. (Los Angeles Unified School District (1984) PERB Decision No. 407.) Here, as discussed above, it is not clear what the word "picketing" means absent modifying language or contextual information. However, as the parties submitted no evidence of bargaining history, the Board must look to contextual information for assistance in understanding the meaning of the contractual language at issue here.

Reading "or other interference" as modifying "picketing" reflects this classic distinction in labor law and policy between non-disruptive informational picketing and picketing with the purpose or effect of disrupting an employer's operations. (Compare NLRB v. Calkins at p. 1089 (truthful informational picketing protected) with Johansen at p. 1294 (informational picketing designed to "signal" disruptive secondary action against employer found unlawful); see also, Retail Clerks Local 324 (1962) 138 NLRB 478, review denied (9th Cir. 1964) 328 F.2d 431 [55 LRRM 2544].) Therefore, in accordance with this classic distinction in labor law and policy reflected in the language of section 17.1, the Board finds the provision excludes non-disruptive informational picketing.[24] This finding is consistent with the grammatical structure of the sentence, gives effect to all the words of the provision (consistent with the mandate in Civil Code sec. 1641), reflects the nature of the rights and waiver requirements implicated by it, is consonant with the legal and historical context within which the agreement arose and exists, and is required in order to give effect to the waiver. Application of the canon of "noscitur a sociis," as argued by CSEA, corroborates this understanding, because it reads picketing in a manner consistent with the other terms listed in section 17.1.

No Clear and Unmistakable Waiver

Whether the focus is placed on the meaning of the word "picketing" or on the proper reading of the entire waiver clause, one dispositive fact is apparent: there is substantial, reasonable disagreement regarding meaning of the contractual language at issue in this case.

[24] The Board makes no ruling or comment regarding the scope or effect of the waiver clause relative to the subjects listed in section 17.1 other than "picketing."

Accordingly, that language is ambiguous and does not constitute a clear and unmistakable waiver of the EERA-protected right to engage in non-disruptive informational picketing.

Unfair Practice Allegations

It is undisputed that, here, the employees' governing board meeting actions were conducted off school property, after school hours, and were peaceable and non-disruptive. Having found no waiver of the union's right to engage in such non-disruptive informational picketing, the Board now turns to the substance of CSEA's claim that the District's threat to discipline employees for engaging in the picketing at issue herein violated EERA section 3543.5(a).[25]

Threatened Discipline for Non-Disruptive Informational Picketing

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982)

[25] EERA section 3543.5(a) provides:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad).)

Applying the Novato test here: (1) the CSEA members, by conducting non-disruptive informational picketing, were, as discussed above, engaged in protected activity; (2) it is undisputed that the employer was aware of that protected activity; (3) that it threatened adverse action in the form of discipline and withdrawal of contractual rights; and (4) that it did so because of the protected activity. Thus, under the Novato test, the District threatened to impose reprisals against CSEA's members because of their exercise of rights protected by EERA, in violation of section 3543.5(a).[26]

The test for whether a respondent has interfered with the rights of employees under EERA does not require that unlawful motive or actual harm be established, only a showing that the employer's conduct "tends to or does result in some harm to employee rights granted under EERA." (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

A threat of discipline for engaging in protected activity, here the activity of non-disruptive informational picketing, "tends to or does result in some harm to employee rights under EERA." The District's threat interfered both with employees' EERA-protected rights to engage in such picketing and, more fundamentally, with the rights granted to employees by the literal text of EERA – to "participate in the activities of the employee organizations of their

[26] Frequently, in cases arising under EERA section 3543.5(a), there is no direct evidence of a "nexus" or causal connection between the adverse action and the charging party's protected activity. Where, as here, there is evidence in writing that the adverse action

own choosing for the purpose of representation on all matters of employer-employee relations." (EERA sec. 3543(a).) Moreover, here, it is undisputed that the number of employees participating in the protected activity of non-disruptive informational picketing was substantially reduced after the District issued its letter threatening discipline for any employee who continued the conduct. The District argues that this indicates the employees understood that the prohibition against "picketing" in the contract included informational picketing because, when apprised of imminent discipline, most ceased the offending conduct. Under all the circumstances of this case, however, the Board finds the more reasonable inference to be that the District's threats chilled employees' exercise of protected rights.

Once interference is shown, the District can offer a rebuttal by showing that its actions were justified by operational necessity. However, since only non-disruptive informational picketing at a public meeting was at issue here, there is no support for such an argument.

Accordingly, the Board reverses the decision of the ALJ and finds that, by issuing its February 14, 2000, letter, the District threatened to impose reprisals for protected activity and interfered with employees' exercise of rights under EERA, thereby violating EERA section 3543.5(a).

Threat to Discontinue Dues Deductions: Employees

For the reasons contained in the summary of the decision of the ALJ, supra, the Board affirms the ALJ's conclusion that, under the reasoning of Fresno, the District violated EERA section 3543.5(a) by threatening to discontinue dues deductions.

Threat to Discontinue Dues Deductions: CSEA

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was undertaken in response to the protected activity, no such analysis of circumstantial evidence of nexus is required.

Regarding the allegation that the threatened discontinuance of dues deductions violated CSEA's rights under Section 3543.5(b), the Board disagrees with the ALJ that violation of Section 3543.5(b) can never be established by showing interference with the union's rights. Interference can, depending on the facts of a case, effectively result in denial of the union's rights. Charges asserting a Section 3543.5(b) violation based on allegations of interference must be examined on their facts to determine the nature and effect of the alleged interference. Longstanding Board precedent contemplates this approach. (See, e.g., the adopted ALJ's decision in State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S (Franchise Tax Board), at p. 51, "The Board has found a section (b) violation where the employer's conduct interfered with, or tended to interfere with, the union's ability and right to represent bargaining unit employees" (citing San Francisco Unified School District (1978) PERB Decision No. 75, and Santa Monica Community College District (1979) PERB Decision No. 103).)

The ALJ correctly noted that Section 3543.5(b) provides that an employer cannot "deny" an employee organization's rights. In recognition of that language, the Board in Franchise Tax Board emphasized that "a showing of theoretical impact" on a union's rights is insufficient to state a Section 3543.5(b) violation. Here, the record reveals that the District's improper use of the collective bargaining agreement to threaten discipline for protected activity chilled employees' exercise of their rights to engage in union-sponsored picketing. Negotiation of an effective CBA is the fundamental means by which a union exercises its right to represent its members. The employer's use of the CBA as a tool to interfere with employees' exercise of their protected rights effectively denied CSEA the right to represent

employees. Thus, the Board overrules the ALJ and finds that the District violated EERA section 3543.5(b) when it threatened to discontinue dues deductions.

Unilateral Change

The Board finds that neither of the parties, nor the decision of the ALJ, adequately developed the issue of whether the District, by threatening to deprive employees of their statutory rights to dues deductions, committed a unilateral change in a matter within the scope of representation. CSEA contends, in essence, that by threatening to discipline employees for informational picketing, the District unilaterally changed the grounds for discipline without affording CSEA notice or an opportunity to bargain.

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant.)

Grounds and procedures for discipline fall within the scope of representation under EERA. (Arvin Union School District (1983) PERB Decision No. 300.) The District announced its clear intent to discipline employees who engaged in non-disruptive, informational picketing without affording CSEA notice or an opportunity to bargain. Although discipline was not imposed, the District's clear statement of intent to implement the disciplinary policy was sufficient to constitute implementation of the change in violation of its

duty to bargain with CSEA. (See Clovis Unified School District (2002) PERB Decision No. 1504; Milpitas Unified School District (1997) PERB Decision No. 1234 (party need not await actual implementation of policy change and should not rest on its rights).)

Accordingly, the Board reverses the decision of the ALJ and finds that the District violated EERA section 3543.5(c) when it unilaterally implemented a change in grounds for discipline by threatening to withdraw employees' dues deduction as punishment for engaging in the protected activity of non-disruptive informational picketing.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the San Marcos Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) by interfering with employees' exercise of rights guaranteed by EERA; by threatening to impose reprisals for protected activity; by threatening to cease dues deductions; and by unilaterally changing the grounds for discipline when it threatened to impose discipline and cease dues deduction in retaliation for employees' exercise of their rights to engage in non-disruptive informational picketing.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Threatening to impose discipline, cease dues deductions, or otherwise impose reprisals because of employees' exercise of their rights to engage in non-disruptive informational picketing;

2. Interfering with employees' exercise of their rights to engage in non-disruptive informational picketing;

3. Threatening to cease employee organization dues deductions;

4. Unilaterally altering the grounds for discipline without affording CSEA notice and an opportunity to bargain.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

2. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the California School Employees Association.

It is further Ordered that the proposed decision of the administrative law judge in Case No. LA-CE-4214-E is hereby REVERSED in part, and AFFIRMED in part, consistent with the discussion herein.

Member Whitehead joined in this Decision.

Member Baker's concurrence begins on page 51.

BAKER, Member, concurring: Although I reach the same conclusion as the majority, I write separately to provide my rationale as well as to explain my differences.

Unlike the majority opinion, I find that this case may be decided relatively easily by application of well settled Public Employment Relations Board (PERB) precedent and common sense. California School Employees Association (CSEA) alleges that the San Marcos Unified School District (District) violated the Educational Employment Relations Act (EERA) section 3543.5(a) by threatening to discipline employees who held informational signs and handed out flyers outside the civic center building which houses the District administrative offices prior to school board meetings. The complaint also alleges that the District violated EERA section 3543.5(b) and (c) by threatening to suspend CSEA's dues deductions and other employees' rights under the collective bargaining agreement for the same conduct.

To demonstrate a violation of EERA section 3543.5(a), CSEA had to show that: (1) employee picketing was an exercise of rights under EERA; (2) the employer was aware of the picketing; and (3) the employer threatened to impose reprisals against the employees because of the picketing. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)

Distribution of leaflets espousing CSEA's view of negotiations accompanied by individuals marching with protest signs in front of a school district administration building is "picketing" under either a layman's or experienced labor law expert's definition of the word. Such informational picketing by employees on behalf of their exclusive representative is conduct protected by the EERA as participation in an employee organization. (Modesto City Schools (1983) PERB Decision No. 291(Modesto); El Dorado Union High School District

(1985) PERB Decision No. 537.)[1] An employer's threats to discipline employees, withdraw rights under the agreement and suspend union dues deductions are adverse actions. If the District took the adverse actions because of the picketing, it would violate the EERA. However, there may be no violation of EERA if CSEA has waived through the collective bargaining agreement employee rights to engage in such conduct. Thus, the central question raised is whether the agreement in section 17.1 waives the right to picket.

Section 17.1 of the agreement provides:

> It is agreed and understood that there will be no strike, work stoppage, slow-down, picketing or refusal or failure to fully and faithfully perform job function and responsibilities, or other interference with the operations of the District by CSEA or its officers, agents, or members, during the term of the Agreement, including compliance with the request of other labor organizations to engage in such activity.

Any waiver by CSEA must be expressed in clear and unmistakable terms, particularly where the waiver of a statutory right is asserted. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) In this case, the waiver would take the form of a clear prohibition of all picketing by employees or CSEA.

Applying common sense and Civil Code section 1645, I find that the agreement does not prohibit all forms of picketing but rather only picketing that, like strikes and work stoppages, interferes with the operation of the District. This clause prohibits CSEA officers, agents, or members from refusing to perform their job functions and responsibilities or in other

[1] I find it unnecessary to resolve the question of whether Compton Unified School District (1987) PERB Order No. IR-50 reversed Modesto on the question of whether EERA incorporates the right of employees to engage in concerted activity. Informational picketing on behalf of one's employee organization is clearly participation in the activities of the employee organization protected under EERA section 3543.

ways interfering with operations of the District during the term of the agreement. It also prohibits CSEA from promoting such activity. To read the agreement as urged by the District and administrative law judge would prohibit all picketing by employees regardless of its impact on the District. This would allow the District to discipline employees who, for example, participated in a retail clerk's picket line in front of a local supermarket. There is no evidence that the parties intended such a consequence when they negotiated the agreement. The activity in question here consisted of employees represented by CSEA picketing outside the civic center building, which houses District headquarters, prior to two public meetings of the District board. There was no evidence in the record that the employees' activity interfered with the operations of the District. Rather the activity took place off school property, after school hours, and without incident. No job functions or responsibilities went underperformed or unperformed. Thus, the agreement does not prohibit the activity. Because the conduct is protected by EERA, the District's letter threatening discipline and other changes is a violation of EERA.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-4214-E, California School Employees Association v. San Marcos Unified School District, in which all parties had the right to participate, it has been found that the San Marcos Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) by interfering with employees' exercise of rights guaranteed by EERA; by threatening to impose reprisals for protected activity; by threatening to cease dues deductions; and by unilaterally changing the grounds for discipline, when it threatened to impose discipline and cease dues deduction in retaliation for employees' exercise of their rights to engage in non-disruptive informational picketing.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Threatening to impose discipline, cease dues deductions, or otherwise impose reprisals because of employees' exercise of their rights to engage in non-disruptive informational picketing;

2. Interfering with employees' exercise of their rights to engage in non-disruptive informational picketing;

3. Threatening to cease employee organization dues deductions;

4. Unilaterally altering the grounds for discipline without affording CSEA notice and an opportunity to bargain.

Dated: _____ SAN MARCOS UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE

REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.